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In the Supreme Court of the United States

October Term, 1976

No. 76-5729

Mark David Oliphant and Daniel B. Belgarde,
Petitioners,

v.

The Suquamish Indian Tribe, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief for the Ute Indian Tribe of the Uintah and Ouray Reservation, As Amicus Curiae

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Pursuant to Rule 42(2) of the Rules of the Supreme Court of the United States, this brief is filed pursuant to consent of the parties evidenced by letters of consent previously filed with the Clerk of this Court.

Interest of Amicus Curiae

Amicus Curiae the Ute Indian Tribe of the Uintah and Ouray Reservation (herein referred to as the "Ute Tribe") is a federally recognized, self-governing American Indian Tribe organized pursuant to federal law and located on the Uintah and Ouray Reservation in north-eastern Utah.

Pursuant to authority granted by its Tribal Constitution (see 25 U.S.C. §476), the Ute Tribe has adopted a Law and Order Code which asserts jurisdiction in its Tribal Courts for all civil and criminal matters occurring within the exterior boundaries of the Tribe's Reservation whenever the action involves,

> "either the Tribe, its officers, agents, employees, property, or enterprises, or a member of the Tribe, or a member of a federally recognized tribe, . . . if the matter is . . . one in which the rights of the Tribe or its members may be directly or indirectly affected (Ute Law and Order Code, §1-2-5, adopted April 11, 1975; effective date, September 15, 1975).

Such jurisdiction has been challenged generally by the State of Utah in a lawsuit now pending before the Utah Federal District Court. Such jurisdiction, insofar as it extends to non-Indians in criminal cases, has been specifically challenged by two non-Indians arrested by the Ute Tribe for trespassing on Tribal trust lands during the Fall 1976 deer hunting season. These non-Indians have filed a petition for federal habeas corpus relief from Tribal Court jurisdiction in

the same Utah Federal District Court, which petition is now pending action by the Court. The issue of civil jurisdiction by the Ute Tribe over non-Indians was an underlying issue in the case of *Brough v. Appawora*, 553 P.2d 934 (Utah S.Ct. 1976), recently vacated and remanded by order of this Court. See *Appawora v. Brough*, ... U.S. ..... (52 L.Ed.2d 384), dated May 2, 1977.

The Ute Tribe has an immediate and fundamental concern for the issues raised herein. This brief is submitted in support of the position taken by the appellee Suquamish Indian Tribe.

SUMMARY OF ARGUMENT

The Ute Tribe believes that the majority opinion of the Court of Appeals below has properly analyzed the issues presented herein and has reached the correct decision in affirming the jurisdiction of the respondent Indian tribe over non-Indians for criminal conduct, occurring on an Indian reservation, which affects the governmental interests of the tribe and the peace and safety of its members. Such conclusion is correct both as to offenses occurring on tribal ("trust") lands as well as on non-Indian roads and rights-of-way running through the reservation.

The Ute Tribe believes that the doctrine of inherent, residual tribal sovereignty provides the appropriate analytical context for deciding this case. No federal laws can be found which expressly remove jurisdiction over non-Indians from the realm of tribal sovereignty, and

established constructional canons relating to Indian legislation should be applied to prevent the speculative or inferential expansion of federal criminal laws dealing with Indian reservations. Tribal jurisdiction over non-Indians has remained dormant as the result of administrative suppression, not its non-existence. Such jurisdiction has not been lost by past non-user. Its exercise under conditions prevailing on most reservations has become a practical necessity.

Amicus curiae, The Ute Tribe, submits that the recent cases of this Court provide a workable test to be applied in delineating the extent of Indian tribal criminal jurisdiction over non-Indians. That test, in the nature of a "minimum contacts" analysis, would permit Indian tribes to exercise criminal jurisdiction over non-Indians "insofar as concerns their transactions [and conduct] on a reservation with Indians [and recognized tribal interests, such as the peace, health, safety and welfare of Indian communities]." Such test is found in this Court's characterization of the rule of ***Williams v. Lee***, 358 U.S. 217 (1959), contained in the case of ***United States v. Mazurie***, 419 U.S. 544, 558 (1975).

Argument

I

THIS COURT HAS RECOGNIZED THAT TRIBAL COURT JURISDICTION CAN PROPERLY EXTEND TO NON-INDIANS IN RELATION TO THEIR CONDUCT ON AN INDIAN RESERVATION WITH INDIANS.

This court's opinion in ***United States v. Mazurie***, 419 U.S. 544 (1975), considered whether or not non-Indian defendants could be prosecuted in federal court under 18 U.S.C. §1161 for failing to comply with tribal alcoholic beverage licensing regulations of the Wind River Tribes in Wyoming. In reply to the contention that it was unfair to subject the non-Indians to regulation by a tribe, in whose government they could not, as non-Indians, participate, this Court replied as follows:

> The fact that the Mazuries could not become members of the tribe, and therefore could not participate in the tribal government, does not alter our conclusion. This claim, that because respondents are non-Indians Congress could not subject them to the authority of the Tribal Council with respect to the sale of liquor, is answered by this Court's opinion in ***Williams v. Lee***, 358 U.S. 217, 3 L.Ed.2d 251, 79 S.Ct. 269 (1959). *In holding that the authority of tribal courts could extend over non-Indians, insofar as concerned their transactions on a reservation with Indians*, we stated:
>
> "It is immaterial that respondent is not an Indian. ***He was on the Reservation and the transaction with an Indian took place there.*** The cases in this Court have consistently guarded the authority of Indian governments over their reservations. Congress recognized this authority in the Navajos in the Treaty of 1868, and has done so ever since. If this power is to be taken away from them, it is for Congress to do it. (419 U.S. at 557-8) [Emphasis added.]

The cited case of ***William v. Lee***, 358 U.S. 217

(1959), has been characterized by this Court as a "landmark decision." See *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 171 (1973). The *McClanahan* case quotes with approval the following from *Williams v. Lee*, relating directly to the issue of Indian tribal court criminal jurisdiction over non-Indians herein:

> Over the years this Court has modified [the tribal sovereignty principle] in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized . . . Thus, suits by Indians against outsiders in state courts have been sanctioned . . . And state courts have been allowed to try non-Indians who committed crimes against each other on a reservation . . . ***But if the crime was by or against an Indian, tribal jurisdiction or that expressly conferred on other courts by Congress has remained exclusive.*** . . . Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." (*McClanahan*, 411 U.S. at 171-2, quoting from *Williams v. Lee*, 358 U.S. at 219-20) [Emphasis added.]

While the *McClanahan* and *Williams* cases dealt with state taxation and state court civil jurisdiction over reservation Indians, respectively, it is significant that both cases have restated that "crimes by or *against* an Indian" are to be handled in either tribal or federal courts. In order for the phrase "against an Indian" to be meaningful, it must include offenses by a non-Indian against an Indian, since offenses "by an Indian" against another Indian would already be covered under the

category of offenses "by . . . an Indian". The only exception to the exclusive tribal-federal court jurisdiction would be offenses by a non-Indian against a non-Indian; the other combinations, Indian against Indian, Indian against non-Indian, and non-Indian against Indian, all come within the phrase "by or against an Indian" for which tribal jurisdiction is exclusive absent an *express* Congressional delegation to another forum. Such an analysis is consistent with the characterization of the *Williams v. Lee* rule contained in *United States v. Mazurie*, supra, 419 U.S. at 558:

> that the authority of tribal courts would extend over non-Indians, insofar as concerned their transactions on a reservation with Indians.

We submit that this last stated formulation provides a reasonable test and standard to be applied in defining the limits of tribal court jurisdiction over non-Indians. It would exempt from tribal court jurisdiction conduct in which the Indians or their tribe have no particular concern (e.g., crimes involving only non-Indians), while allowing Indian tribes to exercise governmental powers in matters involving members of the tribe and threats to the property, peace, health, safety, and welfare of the tribe and its members. As noted above under "Interest of Amicus Curiae," this is the jurisdictional approach which the Ute Tribe, amicus curiae hereof, has taken.

Such a standard can be reasonably analogized to established bases for finding jurisdiction in other contexts. For example, can it not be said that the act of

committing an offense against an Indian on a reservation or committing a breach of the peace or other disruptive conduct within an Indian reservation constitutes sufficient:

> minimum contacts with [the tribe] such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice" (*International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)?

This standard ("transactions on a reservation with Indians"), though necessarily general in its pronouncement, can be refined and applied to the specific circumstances of each case by the judges, both tribal and otherwise, to whom the question is presented. Congress has imposed upon tribal courts the federal standards of both due process of law and equal protection of the laws, as well as specific restrictions relating to criminal procedures. See 25 U.S.C. §1302. Habeas corpus relief is available in federal courts to test the procedures of the tribal courts as applied to both Indians and non-Indians. See 25 U.S.C. §1303. Such protections extend to "persons," not merely to "Indians." See Point III herein below.

Certainly under the operative facts in the instant case it cannot be said to be unfair or unjust to subject Mr. Oliphant to tribal prosecution for his assaulting tribal police officers on Indian trust property during a tribal celebration. Likewise, in the case of Mr. Belgarde, it cannot be said to be unfair or unjust to subject him to tribal prosecution after he had been racing recklessly through the streets of an Indian community, with tribal officers in pursuit, for several hours. Such contacts are far more than minimal; they are recognized as breaches of the peace under any standard of law. Is it any less fair to apply the standards which govern Indian conduct off a reservation to non-Indian conduct on a reservation?

> Absent express federal laws to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the state. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-9 (1973).

The concept of residual, inherent sovereignty provides the theoretical basis for tribal court jurisdiction over non-Indians (see Point III below); the recent decisions of this Court provide the judicial precedent for extending such jurisdiction to criminal as well as civil actions. The repeated recognition of the "right of reservation Indians to make their own laws and be ruled by them" (*William v. Lee*, supra, 358 U.S. at 220) recognizes this power as a sovereign right, one which, if enforceable only against a portion of those who would break tribal laws, would be an empty right indeed. For if "self-determination" and "internal sovereignty" are to have any meaning, they must include the power to preserve the peace and order of the society possessing these powers. As in the case of other sovereignties, such as the States:

> The power and duty of the State to take adequate steps to preserve the peace and to protect

> the privacy, the lives, and the property of its residents cannot be doubted. (*Thornhill v. Alabama*, 310 U.S. 88, 105 (1940)).

This concept was recognized by the Court of Appeals below when it observed that:

> Surely the power to preserve order on the reservation, when necessary by punishing those who violate tribal law, is a sine qua non of the sovereignty that the Suquamish originally possessed. *Oliphant v. Schlie*, 544 F.2d 1007, 1009 (9th Cir. 1976).

To deny such fundamental attributes of sovereignty to Indian tribes would be to render their sovereignty meaningless, placing them at the mercy of persons whom they cannot control, having to look for protection from federal officials who often display indifference in becoming involved in another petty "Indian" case. For many Indian reservations, it is unfortunately still true in large measure as it was in the last century, that:

> They [the Indian tribes] owe no allegiance to the States, and receive from them no protection. Because of local ill feeling, the people of the States where they are found are often their deadliest enemies. *United States v. Kagama*, 118 U.S. 375, 383 (1886).

Effective law enforcement by federal officials is virtually non-existent on most Indian reservations. Federal investigate, prosecutorial and judicial authorities are generally far removed from Indian reservations, both physically and culturally. It is virtually impossible for most tribes to obtain federal prosecution of the

multitude of relatively minor, yet socially disruptive offenses, such as those committed by Messrs. Oliphant and Belgarde. As a practical matter, if the Indian tribes are held to have no jurisdiction over such offenses by non-Indians, the reservations will be converted from reserves for the benefit of the Indians to havens for the lawless among the whites. Such a result is inconsistent with Congressional policy, concepts of federal guardianship, and the precedents of this Court which "have consistently guarded the authority of Indian governments over their reservations." (*Williams v. Lee*, supra, 358 U.S. at 223).

II

THE OFFENSES OCCURRED WITHIN "INDIAN COUNTRY" AND ARE PROPERLY WITHIN TRIBAL JURISDICTION

The authority of an Indian tribe inhabiting an Indian reservation is geographically coextensive with the boundaries of that reservation, regardless of the ownership status of lands therein. Just as a state may define offenses occurring on private roads or other property within its boundaries, so may an Indian tribe. It is the existence of an exterior reservation boundary that defines the territorial extent of tribal jurisdiction, not the title status of each parcel of property therein.

Such an approach is not only consistent with common sense, but with federal law as well. 18 U.S.C. §1151 defines "Indian Country" as follows:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within *the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation*, (b) all dependent Indian communities within the borders of the United States whether within the the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. [Emphasis added.]

As noted in this Court's opinion in *DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2 (1975):

> If the lands in question are within a continuing "reservation," *jurisdiction is in the tribe* and the Federal Government "notwithstanding the issuance of any patent, [such jurisdiction] including rghits-of-way running through the reservation." 18 U.S.C. §1151(a) . . . While §1151 is concerned, on its face, only with criminal jurisdiction, the Court has recognized that it generally applies as well to questions of civil jurisdiction.

Thus, the concept of "Indian country" as defined in 18 U.S.C. §1151 is definitive of the territorial extent of Indian tribal civil and criminal jurisdiction. There can be no reasonable question that Mr. Oliphant's alleged criminal conduct occurred within the territorial jurisdiction of the Suquamish Tribe, as his offense occurred on Tribal lands (lands held in trust for the Tribe by the United States). Mr. Belgarde's offense

occurred on a state highway and a county road within the exterior boundaries of the Tribe's recognized reservation. As developed above, such "rights-of-way" are a part of "Indian country" and within the territorial jurisdiction of the Tribe. As the Ninth Circuit Court of Appeals has previously held in a case involving the authority of a tribal officer to stop and search a vehicle on a state highway running through an Indian reservation:

> [W]e note that the fact that the events of interest here may have occurred within the right-of-way for a state highway avails the defendant nothing. Rights of way running through a reservation remain part of the reservation and within the territorial jurisdiction of the tribal police. See, *Gourneau v. Smith*, 207 N.W.2d 256 (N.Dak. 1973); 18 U.S.C. §1151 (1970). *Ortiz-Barraza v. United States*, 512 F.2d 1176, 1180 (9th Cir. 1975).

III

THE COURT OF APPEALS' RESIDUAL SOVEREIGNTY ANALYSIS IS CONSISTENT WITH EXISTING LAW

The long-standing decisions of this Court recognizing Indian tribal sovereignty have received recent reaffirmation. In declaring the inability of states to collect taxes on Indian income earned on a reservation, this Court has declared as follows:

> The Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolu-

tion of the issues in this suit, but because it provides a *backdrop* against which the applicable treaties and federal statutes must be read. It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long *predates* that of our own Government . . . But it is nonetheless *still true*, as it was in the last century, that "[t]he relation of the Indian tribes living within the borders of the United States . . . [is] an anomalous one and of a complex character . . . They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided." *United States v. Kagima*, 118 U.S., at 381-382, 30 L.Ed. 228. *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 172-3 (1973) [Emphasis added.]

See also *United States v. Mazurie*, 419 U.S. 544, 557 (1975).

The dissent in the *Oliphant* opinion characterizes tribal "sovereignty" as "merely a veil used where the issue is, in fact, one of federal preemption of regulation in the field of Indian affairs." (*Oliphant, supra*, 544 F.2d at 1015). He has confused the "backdrop" referred to in *McClanahan, supra*, which set the stage for consideration and provides a point of reference from which to begin analysis, with the curtain ("veil") which obscures the stage from view. Tribal sovereignty is far

more than a mere analytical tool; it is a venerable doctrine fundamental to the entire field of Indian law.

As one example of how tribal sovereignty continues as a vital precept of Indian law, we cite the following as indicative of its pervasive and fundamental nature. Very recently, this Court has reconfirmed that Indian tribes possess sufficient sovereignty to *immunize* them from unconsented suite in state courts. See *Puyallup Tribe v. Department of Game*, ... U.S. ..... (45 U.S.L.W. 4837, June 23, 1977) citing *United States v. United States Fidelity and Guaranty Co.*, 309 U.S. 506 (1939).

Congress has likewise recently recognized that such sovereign immunity is an inherent and residual characteristic of Indian tribes. See 25 U.S.C. §450n:

> Nothing in this Act [the Indian Self-Determination and Education Assistance Act of 1975] shall be construed as—(1) affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe; . . .

Sovereign immunity for Indian tribes is a residual concept; the tribes are immune from suit because they were originally so as sovereign entities and this attribute of sovereignty has and will continue until modified by the Congress on behalf of the now dominant sovereign, the United States. 25 U.S.C. §450n does not grant sovereign immunity, it recognizes it as already existing.

This Indian Self-Determination and Education As-

sistance Act of 1975 (25 U.S.C. §450 *et seq.*) provides additional insights into the residual Indian sovereignty concept. Given Congress' recognized plenary authority over Indian affairs (see, e.g., *Winton v. Amos*, 255 U.S. 373, 391 (1921), and *Delaware Tribal Business Comm. v. Weeks*, ... U.S. ..... (51 L.Ed. 2d 173, 182-3) (1977)), the recent considered findings and pronouncements of the Congress should be entitled to serious consideration. The "Congressional statement of findings" accompanying this 1975 Act is instructive in several particulars relevant hereto.

> (a) The Congress, after careful review of the Federal Government's historical and special legal relationship with, and resulting responsibilities to, American Indian people, finds that—
>
> (1) the prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the *realization of self-government*, and has denied to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities; and
>
> (2) *the Indian people will never surrender their desire to control their relationship both among themselves and with non-Indian governments, organizations, and persons.* (25 U.S.C. §450) [Emphasis added.]

Not only has the Congress recognized the existence of

a continuing Indian "desire" to control relationships witth "non-Indian . . . persons," but such desire is linked to the concept of self-government and self-determination. The following section of this 1975 Act, 25 U.S.C. §450a, contains a "Congressional declaration of policy" which states, among other things, that, "The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination . . ." (25 U.S.C. §450a(a)).

The question of "The status of Indian tribes" has been used by this Court as a recognized example of a non-judicially reviewable political question. See *Baker v. Carr*, 369 U.S. 186, 215-6 (1962). See also, e.g., *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903). The Indian Self-Determination and Educational Assistance Act of 1975 is a clear Congressional (political) affirmation of residual tribal sovereignty as an attribute of Indian tribal status. Prior acts, relating to Indians generally, have been similarly framed. See, e.g., Section 16 of the Indian Reorganization (or Wheeler-Howard) Act of June 18, 1934 dealing with the "Organization of Indian Tribes": ". . . In addition to all powers vested in any Indian tribe or tribal council by existing law, . . ." (25 U.S.C. §476)

The more recent so-called Indian Civil Rights Act of 1968 (25 U.S.C. §§1301-1303, especially 1302) provides an interesting contrast to dissenting Judge Kennedy's analysis of 18 U.S.C. §§1152 and 1153. He reasons that because these earlier acts specifically refer to "Indians" in defining their scope and limits, that Con-

gress must have assumed that tribal courts could not exercise jurisdiction over non-Indians. See *Oliphant, supra*, 544 F.2d at 1015-1018. By contrast, both of sections 1302 and 1303 of Title 25, United States Code, refer to the rights of "persons" as opposed to "Indians" in reference to official actions by Indian tribes. For example, 25 U.S.C. §1303 provides:

> The privilege of the writ of habeas corpus shall be available *to any person*, in a court of the United States, *to test the legality of his detention by order of an Indian tribe.* [Emphasis added.]

25 U.S.C. §1302 spells out constitutional type rights as limitations on the powers of Indian tribes:

> No Indian tribe *in exercising powers of self-government* shall:
>
> * * *
>
> (3) subject *any person* for the same offense to be twice put in jeopardy;
>
> (4) compel *any person* in any criminal case to be a witness against himself;
>
> * * *
>
> (5) deny to *any person* in a criminal proceeding . . .;
>
> * * *
>
> (8) deny to *any person* within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;
>
> * * *
>
> (10) deny to *any person* accused of an offense

> punishable by imprisonment the right, upon request to a trial by jury of not less than six persons.

As recently as 1968, Congress has, by this Act, recognized that the "powers of self-government" of an Indian tribe can extend to "any person" and that such "persons" are protected in numerous areas exclusively and expressly related to criminal procedures. The cases which have considered the applicability of the protections of the Indian Civil Rights Act to non-Indians have found them to apply, noting that the substitute bill which was offered (in the basic form subsequently enacted), had originally referred to "American Indians" in delineating the beneficiaries of the rights to be established. This phrase was dropped in a later revision of the substitute bill which substituted the phrase "any person" for "American Indian," with the intent "to establish rights for all persons who may be subject to the jurisdiction of tribal governments, whether Indians or non-Indians" (*Dodge v. Nakai*, 298 F.Supp. 17, 24 (D.Ariz. 1968)). See also *Dry Creek Lodge, Inc. v. United States*, 515 F.2d 926, 934 n.8 (10th Cir. 1975); *Schantz v. White Lightning*, 502 F.2d 67, 70 n.5 (8th Cir. 1974); *Hickey v. Crow Creek Housing Authority*, 379 F.Supp. 1002 (D.S.Dak. 1974). We submit that, as has been held in affirming certain implied powers of the United States, the imposition of a limitation on a power is "but an implied assertion" of the existence of the power. See, e.g., *Kohl v. United States*, 91 U.S. 367, 371-72 (1876) regarding the power of eminent domain as implied from the Fifth Amendment limitation thereon regarding the payment of just compensa-

tion. Congress has impliedly recognized the existence of tribal criminal jurisdiction over non-Indians by imposing limitations on the criminal procedures which can be applied to non-Indians and providing them with a federal habeas corpus remedy to test "the legality of their detention" under Tribal jurisdiction.

Indeed, this Court has recently considered the legislative intent behind 18 U.S.C. 1153 and concluded as follows:

> In short, Congress extended federal jurisdiction to crimes committed by Indians on Indian land out of a conviction that many Indians would "be civilized a great deal sooner by being put under [federal criminal] laws and taught to regard life and the personal property of others." That is emphatically not to say, however, that Congress intended to deprive Indian defendants of procedural rights guaranteed to other defendants. . . . *Keeble v. United States*, 412 U.S. 205, 211-12 (1973).

The majority opinion's concluding paragraph in *Keeble* expressly recognizes tribal criminal jurisdiction as an inherent, residual concept:

> Finally, we emphasize that our decision today neither expands the reach of the Major Crimes Act nor permits the government to infringe the *residual jurisdiction of a tribe* by bringing prosecutions in federal court that are not authorized by statute. *Id* at 214. [Emphasis added.]

In a subsequent case considering the history of 18 U.S.C. §1153, this Court notes the position of the

United States regarding the Congressional intent of the Major Crimes Act:

> [T]he Government [in *Keeble*] has characterized the Major Crimes Act as "a carefully limited intrusion of federal power into the otherwise exclusive jurisdiction of the Indian tribes to punish Indians for crimes committed on Indian lands. *United States v. Antelope*, ... U.S. ..... (51 L.Ed.2d 701, 705 n.1) (1977).

Such limited Congressional intent should not be broadly expanded to include limitations on jurisdiction over non-Indians, particularly in light of the "eminently sound and vital canon" which requires that "statutes passed for the benefit ofIndians are to be liberally construed and all doubts are to be resolved in their favor." See *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 655 n.7 (1976).

The concept of inherent tribal sovereignty has received continued recognition from the Executive branch of the Federal Government as well. In an opinion entitled "Powers of Indian Tribes," dated October 25, 1934, issued by the Solicitor of the Department of the Interior in response to questions regarding the meaning of the phrase "powers vested in any Indian tribe or tribal council by existing law" found in Section 16 of the Indian Reorganization (or Wheeler-Howard) Act of 1934 (48 Stat. 984, 987; 25 U.S.C. §476), the Solicitor states as follows:

> Perhaps the most basic principle of all Indian law, supported by a host of decisions hereinafter analyzed, is the principle that *those powers which*

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are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished. Each Indian tribe begins its relationship with the Federal Government as a sovereign power, recognized as such in treaty and legislation. The powers of sovereignty have been limited from time to time by special treaties and laws designed to take from the Indian tribes control of matters which, in the judgment of Congress, these tribes could no longer be safely permitted to handle. The statutes of Congress, then, must be examined to determine the limitations of tribal sovereignty rather than to determine its sources or its positive content. *What is not expressly limited remains within the domain of tribal sovereignty*, and therefore properly fails within the statutory category, "powers vested in any Indian tribe or tribal council by existing law."

> *The acts of Congress which appear to limit the powers of an Indian tribe are not to be unduly extended by doubtful inference.* (55 I.D. 14, 19) [First emphasis in the opinion; others added.]

Accord, see Felix S. Cohen's, *Handbook of Federal Indian Law*, p. 122 (1942) and the United States Department of the Interior's *Federal Indian Law*, pp. 395-6 (1958).

Each coordinate branch of the Federal Government has recognized the existence of inherent tribal sovereignty as an historical fact which enjoys continuing validity. The Court of Appeals and the District

Court below have correctly premised their analysis of the issues herein on the existence of such tribal sovereignty.

IV

PAST FAILURE TO EXERCISE JURISDICTION OVER NON-INDIANS HAS NOT RESULTED IN THE LOSS OF INHERENT TRIBAL SOVEREIGN POWERS RELATING THERETO

In the opinion entitled "Powers of Indian Tribes", *supra*, issued shortly after passage of the Indian Reorganization (Wheeler-Howard) Act of 1934, Department of the Interior Solicitor Margold stated as follows regarding the vitality of the Sovereign powers of Indian tribes which had not theretofore been exercised:

> It is a fact that State governments and administrative officials have frequently trespassed upon the realm of tribal autonomy, presuming to govern the Indian tribes through State law or departmental regulation or arbitrary administrative fiat, but these trespasses have not impaired the vested legal powers of local self-government which have been recognized again and again when these trespasses have been challenged by an Indian tribe. "Power and authority rightfully conferred do not necessarily cease to exist in consequence of long nonuser." (*United States ex rel. Standing Bear v. Crook*, 5 Dill. 453, 460). The Wheeler-Howard Act, by affording statutory recognition of these powers of local self-government and administrative assistance in developing adequate mechanisms for such govern-

> ment, may reasonably be expected to end the conditions that have in the past led the Interior Department and various State agencies to deal with matters that are properly within the legal competence of the Indian tribes themselves. (55 I.D. 14, 28-29 (1934)).

See also *Kohl v. United States, supra*, 91 U.S. at 73: "[T]he non-user of a power does not disprove its existence."

It has only been within the last few years that the prediction of Solicitor Margold has been partially realized with the approval by the Secretary of the Interior of Indian tribal codes asserting both civil and criminal jurisdiction over non-Indians within Indian reservations and in situations involving Indian interests. Congress, in which resides plenary authority over the subject matter, by such acts as the Indian Civil Rights Act of 1968 and the Indian Self-Determination and Education Assistance Act of 1975, has provided both implied and express recognition of, and support for, tribal sovereignty, including criminal jurisdiction over non-Indians "insofar as concern[s] their transactions on a reservation with Indians" (*United States v. Mazurie*, supra, 419 U.S. at 558).

CONCLUSION

Amicus curiae The Ute Indian Tribe submits that the Court of Appeals has properly analyzed and appropriately affirmed the jurisdiction of the Suquamish Tribe over appellants for the criminal offenses com-

mitted by them within that Tribe's reservation. The decision of the Court of Appeals should be affirmed.

Respectfully submitted this 28th day of October 1977.

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